SEP 15 1902
JAMES H. McKENNEY,
Clerk.

Motion to dismiss.

—IN THE—

SUPREME COURT

Filed Sept the 15, 1902.

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error,

vs.

WILLIAM A. PENNY,
Defendant in Error.

384

Motion to Dismiss Petition in Error and Appeal.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error,

vs.

WILLIAM A. PENNY,
Defendant in Error.

MOTION TO DISMISS PETITION IN ERROR AND APPEAL.

Comes now the defendant in the above entitled cause and moves the court to dismiss the petition in error and the appeal in this cause for the reason that this court has no jurisdiction to hear and determine the cause here sought to be presented, because the cause is not one in which the

judgment of the Supreme Court of the Territory of Oklahoma is subject to review by this court.

This cause was originally an action of forcible entry and detainer brought in a justice's court in Kay county, Oklahoma Territory, by William A. Penny against the present plaintiff in error, Ida McClung. The cause was taken by Ida McClung on appeal to the district court of Kay County, Oklahoma Territory and on judgment being rendered for William A. Penny, Ida McClung appealed to the supreme court of Oklahoma Territory, where the judgment against her was affirmed, and which judgment she now seeks to have reversed by this court.

The only thing involved in this cause is the possession of about one hundred and twenty-four (124) acres of land of the rental value of Five ($5.00) Dollars per acre, or Six Hundred and Twenty ($620.00) Dollars per annum. The title to the land is not involved in this cause.

On August 24, 1901, William A. Penny received his final duplicate receipt for the quarter section of land of which the 124 acres is a part, and subsequently brought an action in ejectment to recover the land possessed by Ida McClung and to bar her from any further claim to the quarter section of land. This action resulted in a judgment for William A. Penny, from which Ida McClung appealed to the supreme court of the territory, where the cause is now pending and submitted for the decision of that court. This action gives notice to all persons of the claim of Ida McClung to the land, and in this action the ownership of this land will be fully settled.

The claim of the defendant in error is that only the

possession of the 124 acres of land of the annual rental value of $620.00 is in dispute in this cause. Therefore, "the value of the property or the amount in controversy" does not "exceed five thousand dollars" and the jurisdiction of this court to review the judgment appealed from is not invoked.

The affidavits of William A. Penny, C. V. Harris, John F. Bainum, C. F. Harris, F. C. Butterfield and Michael Brady and a copy of the final receipt of William A. Penny are attached hereto and made a part of this motion.

Wherefore, defendant in error prays that this proceeding be dismissed.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

IDA McCLUNG,
Plaintiff in Error,
vs.
WILLIAM A. PENNY,
Defendant in Error.

AFFIDAVIT.

TERRITORY OF OKLAHOMA, }
County of Kay, } ss.

William A. Penny being first duly sworn, says that he is the defendant in error in the above entitled cause.

That the only thing involved in said cause is the possession of about one hundred and twenty-four acres of the Southwest Quarter (¼) of Section Thirty (30) and Township Twenty-six (26), North of Range One (1), East of the Indian Meridian, in Kay County, Oklahoma Territory; that this action is a forcible entry and detainer action and does not involve the title of said Quarter (¼) Section of land, but only the possession of the part sued for; that the reasonable annual rental value of said land held by Ida McClung against this affidavit, is not more than $5.00 per acre or $620.00 per annum for the land which plaintiff holds from this affiant, and that affiant is well acquainted with the reasonable rental value of land per acre in the vicinity where the land in controversy is located.

Affiant further says that he has made final proof on said land under his homestead entry thereto, and his said final proof has long since been presented to, and accepted by the Register and Receiver of the local land office at Perry, Oklahoma Territory, in which district said land was located at the time, and that on the acceptance of said final proof there was issued to this affiant by the Receiver of said land office, a final receipt for said land, a true and correct copy of which final receipt is hereto attached and marked "Exhibit A" and hereby made a part of this affidavit; that affiant therefore does not hold said land under homestead entry subject to relinquishment by him, but holds it under said final receipt evidencing the grant of said land by the Government of the United States to him.

Affiant further says, that subsequent to his obtaining said final receipt for said land, he being the owner thereof, brought an action in the nature of an action in ejectment under the laws of the Territory of Oklahoma in the District Court of Kay County, against Ida McClung to recover all of said land and to bar the said Ida McClung from any further claim thereto and that said action resulted in a judgment in favor of this affiant; from which the said Ida McClung is now prosecuting her appeal in the Supreme Court of the Territory of Oklahoma, where said action is now pending and submitted for a decision of the court; and that said action will determine the ownership of said land.

The pendency of said action gives notice to all persons of the claim of Ida McClung to said land.

WILLIAM A. PENNY,

Subscribed and sworn to before me this the 2nd day of August, 1902.

E. E. CASS,

Notary Public.

My commission expires on the 6th day of July 1903.

[SEAL.]

TERRITORY OF OKLAHOMA, }
County of Kay, } ss.

C. V. Harris, John F. Bainum, C. F. Harris, F. C. Butterfield, and Michael Brady, each being for himself duly sworn, says, that he has read and knows the contents of the above and foregoing affidavit; and that he is also personally acquainted with the parties thereto and with the tract of land, the possession of which is in controversy in the above cause; and that he knows the reasonable annual rental value thereof, and that said Ida McClung withholds from the possession of said William A. Penny about one hundred and twenty-four (124) acres of said Quarter (¼) Section of land and that the reasonable value of said land so withheld by her is $5.00 per acre, or $620.00 per annum for the land so withheld; that the allegations of the above and foregoing affidavit of William A. Penny are true.

C. V. HARRIS,
JOHN F. BAINUM,
C. F. HARRIS,
F. C. BUTTERFIELD,
MICHAEL BRADY.

32799

Subscribed and sworn to before me this the 2nd day of August, 1902.

E. E. CASS,

Notary Public.

My commission expires on the 6th day of July, 1903.

[SEAL.]

EXHIBIT A.

COPY.

4-140.

Final Receiver's Receipt No. 3781. Application No. 10605.

HOMESTEAD.

Receiver's Office, Perry, Oklahoma Territory.

August 24th, 1901.

Received of William A. Penny the sum of Four Dollars ..... cents being the balance of payment required by law for the entry of Lots Three and Four and the East Half of the Southwest Quarter,

Duplicate.

of Section Thirty in Township 26, North of Range One, East I. M. containing 164.01 acres, under section 2291 of the Revised Statutes of the United States.

JOEL R. SCOTT,

Receiver.

$4.00.

$0.90 Testimony fee received. Number of written words 600. Rate per 100 words fifteen cents.

JOEL R. SCOTT,

Receiver.

Endorsements.

18733.

TERRITORY OF OKLAHOMA, } ss
Kay County, }

Filed for record this 3rd day of Sept. A. D., 1901, at 2:50 o'clock p. m., recorded in book 2, page 32.

E. D. JOHNSON,
Register of Deeds.

Service of the above and foregoing motion and the affidavits thereto attached, as herein above shown, is hereby accepted and I acknowledge the delivery to me of a true and correct copy thereof this 18th day of August, 1902.

S. H. Harris,
Attorney for Plaintiff in Error.

32800

In the Supreme Court of the United States.

IDA McCLUNG,
Plaintiff in Error,
vs.
WILLIAM A. PENNY,
Defendant in Error.

To S. H. HARRIS, Attorney for Plaintiff in Error:

You are hereby notified that on Monday, the 6th day of October, 1902, the Defendant in Error will present his motion with affidavits in support thereof to the Supreme Court of the United States at the court room in the city of Washington, District of Columbia, United States of America, to dismiss the appeal in the above entitled cause.

A true copy of said motion and the affidavits attached thereto, and the brief of defendant in error in support of said motion are served upon you with this notice.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

Service of the above and foregoing notice is hereby accepted this 18th day of August, 1902.

S. H. HARRIS,
Attorney for Plaintiff in Error.

No. 384.

Brf. of Brarer for D. (Gr. mo.)

Office Supreme Court U.S.
FILED
Oct 18 1902
JAMES H. McKENNEY,
Clerk.

—IN THE—

SUPREME COURT

Filed Oct. 18, 1902.

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error
vs.
WILLIAM A. PENNY.
Defendant in Error

384

Brief on Motion to Dismiss Petition in Error and Appeal.

C. W. RANSOM,
and
DALE & BIERER,
Attorneys for Defendant in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error

vs.

WILLIAM A. PENNY.
Defendant in Error

BRIEF ON MOTION TO DISMISS PETITION IN ERROR AND APPEAL.

The defendant in error asks the court to dismiss the petition in error and appeal in this court for the reason that this court has no jurisdiction to review the judgment appealed from.

Section 9 of the Organic Act of Oklahoma (26 St. 81, 85) provides:

"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars."

The judgment of the district court of Kay county, Oklahoma Territory, which was affirmed by the Supreme Court of the Territory, adjudged that the plaintiff, William A. Penny, have restitution in a forcible entry and detainer action of the quarter section of land described in the judgment. No part of the decree affected the title to the land. The affidavit of William A. Penny, corroborated by the affidavit of five other witnesses, states that only the possession of 124 acres of the quarter section of land described in the pleadings in the trial court are involved in this cause, and that the annual rental value of said land is five dollars ($5.00) per acre, making only a total of Six Hundred and Twenty ($620.00) Dollars per annum. The showing of defendant in error also discloses the fact that on August 24, 1901, a final receipt was issued by the Receiver of the United States Land Office at Perry, Oklahoma, for this land, thus taking the land out of the category of homestead lands subject to relinquishment, so that Penny might by relinquishment defeat the right of Ida McClung as claimed in the affidavits of plaintiff in error which she files in order to show that this court has jurisdiction. The final receipt having been issued, we contend that the land is private property, and in no sense homestead lands of the United States subject to the mere inchoate right of a homestead entry which might be cancelled by relinquishment of the entryman and the land acquired by an innocent third party. The land is now private property and transferrable by deed of William A. Penny. Penny's affidvait, corroborated as above stated, also shows that subsequent to the obtaining of the final receipt on August 24, 1901, he being the owner of the land,

brought an action in ejectment in the district court of Kay County against Ida McClung to recover all of said land and to bar the said Ida McClung from any further claim thereto, and that in this action a judgment was rendered for Penny, from which she now prosecutes her appeal in the supreme court of the territory where the cause has been submitted for decision of the court, and that this action will determine the ownership of the land, and that the pendency of this action gives notice to all persons of the claim of Ida McClung to this land.

We, therefore, contend that the title or ownership of the land, valued by the plaintiff in error in her showing at more than five thousand dollars, is in no way involved in this cause; that that property is involved in another action pending in the court from which this appeal is taken; but that in this action only the value of the possession, not worth more than $620.00 per annum is involved, and that the amount in controversy, therefore, is not shown to exceed five thousand dollars in order to give this court jurisdiction in this cause.

We presume that plaintiff in error will rely upon the decision of this court in the case of *Black vs. Jackson,* 177 U. S. 349, where the court said:

"Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession."

That, however, was in a case where the court found that the defendant "proceeds in his defense upon the ground that after residing upon the land for the period designated in the statute he will be entitled under the law to a patent.

It ought not to be assumed that he will put himself in such position that he cannot demand a patent,"

And where the court further held,

"The demurrer admitted the averment in the answer to the effect that the land with the defendant's improvements thereon could be transferred in the manner stated in the answer for the sum of $6,000.00."

No such cause is presented here. In that case the court proceeded upon the theory that the title to the land was involved, and that the situation was such that a transfer by relinquishment of the homestead entry of Jackson would be a loss to Black, if he were dispossessed from the land, of the value of the land admitted to be $6,000.00. In this cause there is no title to the land involved, and it is not subject to the relinquishment of Penny so as to defeat the rights of Ida McClung. On the other hand, her rights will be fuly protected in an appropriate action of ejectment involving the title and ownership to this land, and which action is now pending in the courts of Oklahoma.

That the title to this land can in no way be involved in this action has been repeatedly settled by decisions of the supreme court of Oklahoma Territory.

In the case of *McDonald vs. Stiles*, 7 Okla. 327, the supreme court said:

"The action of forcible entry and detainer is purely a possessory action, and the question of title or boundaries cannot properly arise or be tried in such a proceeding."

This rule was followed in *Dysart vs. Enslow*, 7 Okla. 386, and *Coke vs. Braden*, 67 Pac. 475.

The judgment in this cause is in no way a bar to any other action brought by either party to this suit.

Section 4807 Oklahoma Statutes of 1893, provides:

"Judgments, either before a justice or in the district court, in actions brought under this article, shall not be a bar to any other action brought by either party."

This section was adopted in Oklahoma from the statutes of Kansas where the section has been repeatedly construed.

In the case of *Waite vs. Teeters,* 14 Pac. 146, the supreme court of Kansas said:

"An action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the corn grown by the tenant upon the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such corn, or to any after-action brought by either party."

In the case of *Redden vs. Tefft,* 29 Pac. 157, it was contended that the judgment in a forcible entry and detainer action theretofore entered barred the pending suit. The court answered this as follows:

"Two sufficient answers dispose of this contention: First. Article 13 of procedure before justices, relating to forcible entry and detainer, provides that "judgments, either before a justice or in the district court, in action brought under this article, shall not be a bar to any after-action brought by either party."

There being then nothing involved in the case but the possession of the land worth not more than $620.00 per annum, and the judgment appealed from being such as can in no way be a bar to or affect the title to this land which is in litigation by the parties in another action, we contend that the court should not entertain this appeal. The property which is the subject of the possession not being involved, its value should not be considered, and the jurisdiction of this court will depend entirely then on the

"amount in controversy" exceeding "five thousand dollars."

A construction of similar language in the Organic Acts of the Territories has several times been before this court.

In the case of *Potts vs. Chumasero*, 92 U. S. 358, which was a proceeding in eror from the supreme court of the Territory of Montana, the court said:

"In *Barry vs. Mercien*, 5 How. 120, it was held, Chief Justice Taney speaking for the court, that, in order to give us jurisdiction in a case dependent upon the amount in controversy, "the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained."

The case of *United States vs. Railroad Co.* 105 U. S. 263 was on error to the supreme court of the Territory of Wyoming. The action was one to replevin certain goods of the United States on which the railroad company was adjudged to have a lien of $586.16. This court held that a writ of error would lie to the supreme court of Wyoming only when the amount in controversy exceeded one thousand dollars, and dismissed the appeal.

So, by parity of reasoning, we claim that it is not the value of the land, as in that case it was not the value of the goods, but the value of the possession, as in that case it was the value of the lien which determines this court's jurisdiction.

In the case of *Lownsdale vs. Parish*, 21 How. 290, the action was on an appeal from the supreme court of the Territoy of Oregon. The complaint of the plaintiff was against the obstruction of a street in the city ot Portland opposite his lots. The court held the title to the ground which was he subject of the action was not in controversy,

and as the amount of damages which the plaintiff would incur by the occupation of the street by the defendant was not shown, that this court had no jurisdiction of the appeal.

In the case of *Kurtz vs. Moffit*, 115 U. S. 487, the court said:

"From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by congress upon any court of the United States, of suits at law or in equity in which the mater in dispute exceeds the sum of value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money."

This being true, if the proceedings in error present a case of this character where the right involved is capable of being valued in money, then it is incumbent upon the appellant to shew to this court in the appeal from the supreme court of Oklahoma Territory that the amount of money involved exceeds $5,000.00.

The case of *Cameron vs. United States*, 146 U. S. 533 was one brought by the Government to abate a wire fence on lands in the Territory of Arizona. The court in dismissing the appeal said:

"It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case. Had the defendant succeeded in the action he would not have established a title to the property, but a color of title to it, and the adjudication would have been of no value to him, except so far as to permit the fence to stand. He could not have made it the basis of an action of ejectment or other proceeding to test his actual title to the premises in question."

The value of the land there in dispute was shown by

affidavit to be more than five thousand dollars, and the chief justice in the alowance of an appeal found that the property in controversy exceeded that sum, but the property itself not being in controversy and not being for determination in that cause its value could not be made the basis of the court's jurisdiction. And so we claim here there being nothing in controversy except the value of the possession, which is worth only a fraction of $5,000.00, the cause is not one within the jurisdiction of this court.

The case of *Carne vs. Russ,* 152 U. S. 250 was an action in equity by the owner of land worth $40,000.00 to set aside and cancel a cloud theron created by tax title. The sum adjudged to the defendant was less than $5,000.00, the jurisdictional amount. This court dismissed the appeal holding that the money adjudged to the defendants as their claim against the land was the only matter in controversy, and that the value of the land could not give this court jurisdiction of the appeal.

The only cases which we have been able to find exactly in point with the case at bar are two decisions of the supreme court of Louisiana.

In the case of *In Re. Genella,* 14 So. 302, the supreme court of that state held:

"Where the issue between the parties to a suit is not the right of ownership, but the right of possession, and the value of the latter right is as to amount below the appellate jurisdiction of the supreme court, an appeal taken to that court will be dismissed *ex proprio motu.*"

In the case of *Lea vs. Orleans,* 16 So. 456, the same court held:

"Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal of the supreme court."

We, therefore, very respectfully ask that the petition in error, the appeal, and these proceedings be dismissed.

C. W. RANSOM,
and A. L. C. Bierer
of DALE & BIERER,
Attorneys for Defendant in Error.